Supreme Court, U.S.
FILED

No. 98 899 MAY 19 1998

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In The

Supreme Court of the United States

October Term, 1997

PETER BASSO,

Petitioner,

vs.

SHIRLEY S. CHATER, Commissioner
of Social Security.

Respondent.

On Petition For A Writ Of Certiorari

To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTION PRESENTED

Has a Social Security disability claimant presented a "colorable" constitutional claim to give the district court subject matter jurisdiction when the Social Security Administration denies him the right to review the evidence in the Social Security Administration file before proceeding with an administrative hearing?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Peter Basso (hereafter "Basso"), respectfully petitions this Court to issue a writ of certiorari to review the February 18, 1998, decision of the United States Court of Appeals for the Ninth Circuit (hereafter, "Ninth Circuit"), affirming the district court's dismissal of his appeal on grounds of lack of subject matter jurisdiction over the action of the Commissioner of the Social Security Administration to dismiss his request for a hearing.[1]

In the U.S. District Court for the Northern District of California, Basso sought judicial review of a decision of the Commissioner of the Social Security Administration to dismiss his request for hearing, which was to consider the denial of his application for Supplemental Security Income and Plan to Achieve Self-Support (PASS). The district court dismissed the claim on thegrounds that the court did not have jurisdiction to review Basso's claim because his failure to attend the administrative hearing constitutes a failure to exhaust administrative remedies upon which judicial review depends, and the court did not have an independent ground of jurisdiction because the alleged violation of due process was not "colorable." The Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the case for lack of subject matter jurisdiction on the grounds that "Basso failed to exhaust his administrative remedies pursuant to 42 U.S.C. Section 405(g) . . . (and) He also failed to allege a 'colorable' constitutional claim, and thus does not come within the exception to Section 405(g)," citing Hoye v. Sullivan, 985F.2d 990, 991 (9th Cir. 1992), and the Court gave no further explanation for its decision.

Because Basso has supported his allegations with documentation that his right to due process of law under the Fifth Amendment to the U. S. Constitution was violated by the actions of the Adminis-

---

[1] Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel, should be substituted as the Commissioner of the Social Security Administration. No further action need be taken to continue this suit by reason of the last sentence of Section 205(g) of the Social Security Act, 42 U.S.C. Section 405(g).

trative Law Judge and the Commissioner of the Social Security Administration, and neither the allegations nor the documentation has ever been denied or refuted by the Commissioner of the Social Security Administration, he hereby petitions for a writ of certiorari.

OPINIONS BELOW

Petitioner, Peter Basso, became eligible for Disability Insurance Benefits effective February 1978 and for Supplemental Security Income (SSI) benefits as of January 1979 (Appendix at 5a). In 1987, The Social Security Administration approved Basso's Plan to Achieve Self-Support (PASS) pursuant to Section 1312(b)(4)(B)(iv) of the Act (Appendix at 6a). This PASS, which identifies becoming a lawyer as Basso's occupational objective, allowed him to exclude from his countable income for SSI purposes those amounts of income he needed to fulfill his plan for self-support (Appendix at 6a). The Social Security Administration took action to terminate Basso's PASS on the grounds that it had exceeded the former regulatory time limit of 48 months, and he appealed, challenging the validity of the time limit (Appendix at 6a). On November 14, 1994, a Stipulated Order was filed, in which the Social Security Administration agreed not to enforce 20 Code of Federal Regulations Section 416.1181(d), the 48 month time limit set out in the regulations, and agreed that an individual's PASS could be extended beyond 48 months if the individual is otherwise in compliance with PASS regulations and the objectives of the existing PASS, and needed additional time to complete the PASS, and if he or she could demonstrate a need to exclude additional income or resources necessary to complete the PASS, which resulted in Basso receiving additional SSI and PASS benefits through February of 1994 (Appendix at 6a).

While Basso's civil suit was pending, he filed an application for a new PASS plan, which had the goal of becoming a practicing attorney and to establish a law office (Appendix at 6a). The claim was denied initially and on reconsideration.

Basso filed a request for a hearing before an administrative law judge. Basso came to the Office of Hearings and Appeals on the day of the hearing, but he left the waiting room and did not attend the hearing after his alleged request to review the evidence in the Social Security file was denied by the Office of Hearings and Appeals clerk

and the Administrative Law Judge's (hereafter "the ALJ") assistant Appendix at 6a-7a, 25a-28a). On May 11, 1995, the Administrative Law Judge issued a Notice of Dismissal of the request for hearing on the grounds that "(Basso) abandoned his request for hearing by refusing to go into the scheduled hearing because there was a security guard in the hearing room" (Appendix at 6a, 14a-20a). The Appeals Council denied Basso's request for review of the ALJ's dismissal of his hearing request on the grounds among other things that "Although you have alleged that you were denied access to your claim file, there is no evidence supporting your allegation," and the Council held that "The Appeals Council has concluded that the Administrative Law Judge acted properly in dismissing your request for hearing as your refusal to enter the hearing room, except on your own terms, may be construed as failure, without good cause, to appear at the place set for the hearing (20 CFR 416.1457)" (Appendix at 6a-7a, 21a-24a).

Basso then filed this civil action (Appendix at 1a-4a). On December 6, 1996, the district court granted the Commissioner of the Social Security Administration's motion to dismiss the claim on the grounds that the court did not have jurisdiction to review Basso's claim because his failure to attend the administrative hearing constitutes a failure to exhaust administrative remedies upon which judicial review depends, and the court did not have an independent ground of jurisdiction because the alleged due process claim was not "colorable" (Appendix at 5a-10a).

Basso appealed the district court's rulings to the Court of Appeals for the Ninth Circuit (Appendix at 11a). Basso argued that the district court had subject matter jurisdiction under 42 U.S.C. Section 405(g) to consider the alleged violation of due process of law that was based on the alleged violation of his regulatory and constitutional right to review the evidence in the Social Security Administration claims file before proceeding with the administrative hearing, which raised a "colorable" constitutional issue. By Memorandum filed on February 18, 1998, the Court of Appeals affirmed the district court's dismissal of Basso's case for lack of subject matter jurisdiction (Appendix at 36a-37a). Specifically, the Ninth Circuit Court of Appeals held as follows:

> "***The district court correctly concluded that it lacked subject matter jurisdiction. Basso failed to exhaust his administrative remedies pursuant to 42 U.S.C. Section 405(g). He also failed to allege a "colorable" constitutional claim, and thus does not come within the exception to Section 405(g). Thus, we affirm the district court's dismissal of this case for lack of subject matter jurisdiction. AFFIRMED.

(See Appendix at 36a-37a).

GROUNDS FOR JURISDICTION

The Memorandum of opinion of the Court of Appeals for the Ninth Circuit was filed February 18, 1998 (Appendix at 36a). The instant petition for a writ of certiorari is filed within 90 days and is timely under Supreme Court Rules 13.1 and 29.2.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Fifth Amendment of the United States Constitution in part is at issue:

> Procedural due process.

42 U.S.C. Section 405(g) in part is at issue in the instant appeal:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action . . . [...]

20 Code of Federal Regulations, Section 416.1457 Dismissal of a request for a hearing before an administrative law judge:

> An administrative law judge may dismiss a request for hearing under any of the following conditions:
>
> > (b)(1) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and you have been notified before the time set for the hearing that your request for a hearing may be dismissed without further notice if you did not appear at the time and place of the hearing, and good cause has not been found by the administrative law judge for your failure to appear. (Appendix at 34a).

20 Code of Federal Regulations, Section 416.1429 Hearing Before an Administrative Law Judge - General:

> If you are dissatisfied with one of the determinations or decisions listed in Section 416.1430 you may request a hearing. The Associate Commissioner for Hearings and Appeals, or his or her delegate, shall
>
> appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Associate Commissioner, or his or her delegate, may assign your case to another administrative law judge. At
>
> the hearing you may appear in person, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you

> questions. He or she shall issue a decision based on the hearing record. If you waive your right to appear at a hearing the administrative law judge will make a decision based on the evidence that is in the file and any new evidence that may have been submitted for consideration. (Appendix at 33a).

Social Security Ruling 79-19 Waiver of Personal Appearance at a Hearing:

> Additional steps should be taken to insure that an individual's waiver of personal appearance at a hearing is done knowingly and entirely voluntarily. (See Appendix at 29a-32a).

STATEMENT OF THE CASE

Basso seeks review of a judgment of the U. S. Court of Appeals for the Ninth Circuit. The basis for federal jurisdiction in the court of first instance, the U. S. District Court for the Northern District of California, was pursuant to 42 U.S.C. Section 405(g), insofar as to consider only whether Basso has presented a sufficient "colorable" constitutional issue for purposes of giving the District Court subject matter jurisdiction.

Basso petitions for a writ of certiorari to review the Memorandum of opinion of the Ninth Circuit affirming the dismissal of Basso's appeal by the District Court.

The following facts are material to consideration of the questions presented:

1) Basso appeared without representation at the Commissioner of the Social Security Administration's (hereafter "the Commissioner") Office of Hearings and Appeals (hereafter "OHA") on the day of his scheduled hearing before an Administrative Law Judge, and he was told by the OHA office clerk and the ALJ's hearing assistant that he was not allowed to see the evidence in the Social

Security Administration claims file, after which he left OHA, and he wrote and faxed a letter to the ALJ on the afternoon of the scheduled hearing to inform him of the events that occurred that morning with the OHA office clerk and the hearing assistant, as he alleged in the Declaration that was submitted as Exhibit A (copy of the faxed letter as Exhibit B) to his brief to the district court. (Appendix at 25a-26a, 27a-28a).

2) The ALJ found that "The (petitioner) abandoned his request for hearing by refusing to go into the scheduled hearing because there was a security guard in the hearing room." (Appendix at 17a).
3) The Commissioner's Appeals Council held that "Although you allege that you were denied access to your claims file, there is no evidence supporting your allegation." (Appendix at 22a).
4) The district court found that Basso had failed to exhaust his administrative remedies and questioned the factual allegation regarding whether he was actually denied access to his claims file on the morning of the scheduled hearing, and the district court held that there was no "colorable" constitutional issue because Basso could have made other arrangements to examine the evidence in the Social Security Administration's claims file. (Appendix at 8a).
5) The Court of Appeals for the Ninth Circuit held that it agreed with the decision of the district court that it did not have subject matter jurisdiction because Basso failed to exhaust his administrative remedies, and he failed to allege a "colorable" constitutional claim. (Appendix at 37a).

REASONS FOR GRANTING THE WRIT: ARGUMENT

Petitioner respectfully submits that this case presents an important federal question for which there are compelling reasons the petition for writ of certiorari should be granted. Because the Social Security Act is a federal program, national in scope and remedial in purpose, there is a compelling need for a "meaningful opportunity to be heard."

This case involves an important question of federal law in

regards to what constitutes sufficient evidence of a "colorable" constitutional claim, involving an alleged violation of procedural due process, to give federal courts subject matter jurisdiction. This Court should settle this important issue in order to prevent cases, where there is evidence of a denial of a "meaningful opportunity to be heard" at an administrative hearing, from evading review by way of summary dismissal.

Section 205(g) of the Social Security Act, 42 U.S.C. Section 405(g) gives the district court jurisdiction to review only " . . . any final decision of the (Commissioner of Social Security) made after a hearing." Hoye v. Sullivan, 985 F.2d 990, 991 (9th Cir. 1992); citing Califano v. Sanders, 430 U.S. 99, 108, 97 S.Ct. 980, 985, 51 L.Ed.2d 192 (1977).

However, the Court in Hoye went on to state that "we may waive (claimant's)failure to exhaust his administrative remedies if he demonstrates that his constitutional claim is (1) collateral to a substantive claim of entitlement, (2) colorable, and (3) 'one whose resolution would not serve the purposes of exhaustion.' " Hoye v. Sullivan, supra, 985 F.2d at 795; citing Mathews v. Eldridge, 424 U.S. 319, 330-332, 96 S.Ct. 893, 900.901, 47 L.Ed.2d 18 (1976); see also Califano v. Sanders, 430 U.S. at 109; 97 S.Ct at 986 ("when constitutional questions are in issue, the availability of judicial review is presumed"). Basso agrees that under Section 405(g) the power to determine when finality has occurred ordinarily rests with the Commissioner, but he contends that his interest in having the alleged "colorable" constitutional issue resolved is so great that deference to the agency's judgment is inappropriate. Mathews v. Eldridge, supra, 424 U.S. at 331.

Both the district court and the Court of Appeals for the Ninth Circuit relied on Hoye to find that Basso failed to allege a "colorable" constitutional claim to come within the exception to the finality requirement of Section 405(g) and to conclude that the courts lacked subject matter jurisdiction. However, the Court of Appeals for the Ninth Circuit did not set forth any reasons for its decision other than to state that "The district court correctly concluded that it lacked subject matter jurisdiction" and to summarily conclude that Basso failed to exhaust his administrative remedies and failed to alleged a "colorable" constitutional claim (Appendix 37a). The district court

discussed one of the three Hoye conditions and held that "The Ninth Circuit stated that 'a constitutional claim is not colorable if it clearly appears to be immaterial and is made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous," but the court did not reach a conclusion on this issue or any of the other Hoye conditions (Appendix at 8a).

Significantly, the district court found that "This Court finds that even accepting Basso's version of the facts as true, he was not denied due process" (Appendix at 11a). Basso alleges that the district court erred in failing to consider and discuss all of the material evidence that was submitted to the district court in the form of a Declaration by Basso as to the events on the morning of the administrative hearing and a copy of the letter that he faxed to the ALJ in the afternoon of the day of hearing, both of which remain undisputed and uncontroverted in that counsel for the Commissioner has never denied the allegations in the Declaration nor that the ALJ received the letter that Basso faxed to him. The district court went on to hold that there was no due process violation because "Basso could have requested that the ALJ allow him to review his files at the hearing . . . If the ALJ refused after such a request was made, Basso could have presented his objections to the Appeals Council after the hearing" (Appendix at 8a-9a), but the district court disregarded the undisputed fact that Basso attempted to talk to the ALJ on the morning of the hearing about his case and that he was told by the ALJ's hearing assistant that the ALJ did not speak with the public (Appendix at 25a-28a), and the district court disregarded the undisputed fact that the ALJ received the letter that was faxed to him by Basso that put the ALJ on notice that he did not go ahead with the hearing because he was not allowed to see the evidence in the Social Security Administration claims file (Appendix at 27a-28a). Basso contends that the district erred in holding that it did not have subject matter jurisdiction because undisputed and uncontroverted evidence must be accepted as true, and the district court failed to consider all of the additional material evidence regarding the alleged violation of procedural due process. Laurie v. Callahan, 973 F.Supp. 925, 928 (N.D.Cal. 1997); citing NL Industries Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986) (when complaints are attacked for lack of subject matter jurisdiction, the factual allegations in the complaint will be

taken as true and construed in the light most favorable to the claimant). Basso contends that his case is distinguishable from Hoye because in Hoye there was no evidence that the ALJ was biased, whereas in the instant case Basso submitted uncontested and uncontroverted evidence that he appeared at the hearing office at the date and time of the hearing and that he was told by the OHA office clerk and the ALJ's assistant that he was not allowed to examine the evidence in the Social Security Administration claims file.

Basso contends that the denial of the right to examine the evidence in the Social Security Administration claims file raises a "colorable" constitutional issue under the Fifth Amendment of the United States Constitution regarding the right to due process of law because the United States Supreme Court has held that "What we said in Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959) is particularly pertinent here":

> "***Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

Goldberg v. Kelly, 397 U.S. 254, 269-270, 90 S.CT. 1011, 1021, 25 L.Ed.2d 287

(1970). The Commissioner's Regulations state in pertinent part that "At the hearing you may appear in person, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses" (20 Code of Federal Regulations Section 416.1429) (Appendix at 33a).

The Court of Appeals for the Ninth Circuit also cited Evans v. Chater, 110 F.3d 1480, 1481 (9th Cir. 1997), for the proposition that a review of a dismissal for lack of subject matter jurisdiction is reviewed de novo. However, in Evans the claimant had a hearing before an administrative law judge who denied his claim to reopen prior applications, and the Court in Evans held that "the Sanders

exception (to Section 405(g)'s finality requirement) applies to any colorable constitutional claim of due process violation that 'implicate[s] a due process right [either] to a meaningful opportunity to be heard,' id. or to seek reconsideration of an adverse benefits determination." id. at 1483. Basso contends that aside from the fact that appearing in front of an administrative law judge and being presented with the evidence that is to be used in making a decision may not be "a meaningful opportunity to be heard" because it may prevent the person from being able to present an adequate defense, the district court disregarded the fact that Basso made two attempts to communicate with the ALJ about examining the evidence in the Social Security Administration claims file, and the ALJ did not respond other than to order dismissal of his request for hearing on the grounds that he refused to go ahead with the hearing because of the presence of security guards, which allegedly is the kind of "manner" and "means" that implicates a violation of the due process right to "a meaningful opportunity to be heard" contemplated by the Court in Evans. Finally, Basso contends that the district court erred by holding that in the alleged circumstances that were accepted by the court Basso still had the responsibility to some way examine the evidence in the Social Security Administration claims file and proceed with the hearing, rather than asserting his rights to the OHA office clerk and the ALJ's hearing assistant and in the letter to the ALJ and leaving after being denied, because this disregards this Court's holding that when Congress granted the (Commissioner of the Social Security Administration) the power by regulation to establish hearing procedures, "There emerges an emphasis upon the informal rather than the formal . . . and should be liberal and not strict in tone and operation . . . This is the obvious intent of Congress so long as the procedures are fundamentally fair." Richardson v. Perales, 402 U.S. 389, 400-401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). Basso contends that ensuring "fundamental fairness" in the hearing procedures is the duty of the court, not the claimant, and the manner in which he was not allowed to examine the evidence in the Social Security Administration claims file, and the means and reasons used by the ALJ to dismiss his request for hearing, were fundamentally unfair and raised a "colorable" constitutional claim sufficient to give the district subject matter jurisdiction. Basso's contends

that his refusal to proceed with a personal appearance before the ALJ was analogous to a waiver of personal appearance and in the instant case was not done knowingly and voluntarily (Appendix at 29a-32a for SSR 79-19).

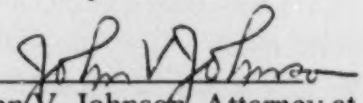
Basso contends that if the courts had any doubts about the factual allegations as to whether the ALJ and his assistants denied him the right to examine the evidence in the Social Security Administration claims file before proceeding with the hearing, such that the issue of whether he has raised a "colorable" constitutional claim on the grounds alleged in his Declaration and letter faxed to the ALJ cannot be resolved, then his case should be remanded for a full investigation of the facts. If the full factual allegations are accepted as true, then this Court should grant Basso's petition for writ of certiorari and resolve the issue of whether the kind of evidence that was submitted to the district court is sufficient to raise a "colorable" constitutional claim because informal and unrecorded alleged denials of a "meaningful opportunity to be heard" may otherwise evade review through erroneous summary dismissals. Finally, Basso's petition for a writ of certiorari should be granted to resolve the issue of whether the courts below properly considered and applied the criteria set forth in Hoye for determining whether the district court had subject matter jurisdiction over the alleged "colorable" constitutional claim.

CONCLUSION

For the foregoing reasons, Basso respectfully prays that this Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: July 28, 1998

Respectfully Submitted

By 

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETER BASSO, Plaintiff, V. SHIRLEY S. CHATER, Commissioner of Social Security, Defendant.	)	CIV. NO. COMPLAINT

1. Plaintiff, Peter Basso (Social Security Number 555-72-2045) is a resident of the Northern District of Caffornia and brings this action to review the decision of the Commissioner of Social Security to dismiss his request for hearing under 42 U.S.C. Sections 405(g) and 1383(c)(3), as amended.

2. On September 5, 1995, the Appeals Council denied the request for review of the decision of the Honorable F. Neil Aschemeyer, Administrative Law Judge, to dismiss his request for a hearing.

3. Plaintiff became eligible for Disability Insurance Benefits under Sections 216(i) and 223 and for Supplemental Security Income under Section 1614(a)(3)(A) of the Social Security Act, based on a combination of cardiac abnormalities and acute anxiety, commencing January 30, 1979.

4. Plaintiff was determined to be entitled to a plan to achieve self-support (PASS) as part of his Supplemental Security Income for an initial period that was later extended to 48 months, during which time his income was excluded as necessary for the fulfillment of such plan under Section 1612(b)(4)(B)(iv) of the Social Security Act.

5. Plaintiff was determined initially and by reconsideration determination to be ineligible for Supplemental Security Income benefits due to having chargeable excess income, based upon termination of his plan to achieve self-support (PASS).

6. Plaintiff filed a timely Request for Hearing, and on February 3, 1994, the Administrative Law Judge found that plaintiff s plan to achieve self-support (PASS) may be extended beyond 48 months for him to take the bar examination but not beyond July 1994, and from December 1991through July 1994 his income was excludable, which made him eligible for Supplemental Security Income from December 1991 through July 1994.

7. On March 3, 1994, the Appeals Council notified plaintiff that based on a review by the Council, his plan to achieve self-support cannot be extended beyond the 48 month limit as provided in 20 Code of Federal Regulations Section 416.1181(d), and absent new and material evidence or pertinent legal argument, the Council proposed to issue a final decision that he was not eligible for **Supplemental** Security Income benefits as of 12-1-91 due to excess income. After receiving new evidence submitted by plaintiffs former representative, on 5-27-94 the Appeals Council issued a final decision **that found that** the Social Security Administration acted properly in terminating plaintiffs plan to achieve self-support effective 12-1-91 at the end of the 48 month limit and that he was ineligible for Supplemental Security Income benefits effective 12-1-91 due to excess income.

8. On July 25, 1994, plaintiff filed a complaint in this Court to commence a civil suit, which is still pending at this time.

9. On October 27, 1994, the Social Security Administration notified plaintiff that his claim for a new plan to achieve self-support (PASS) with a new objective was not approved.

10. On November 8, 1994, plaintiff s Request for Reconsideration was denied.

11. Plaintiff filed a timely Request for Hearing, and on the day of the scheduled hearing he appeared with a witness at the hearing office, but when he was allegedly denied his right to review the Exhibit file and was confronted by two federal police and a security guard, he refused to go ahead with the hearing with the belief that his rights to due process of law and to have an informal and non-intimidating administrative hearing were being denied, which was done without the intention of abandoning his claim or his rights. On May 11, 1995, the Honorable F. Neil Aschemeyer, Administrative Law Judge, issued a Notice of Dismissal on the grounds that "The (plaintiff) abandoned his request for hearing by refusing to go into the scheduled hearing because there was a security guard in the hearing room. "

12. Plaintiff filed a timely appeal, and on September 5, 1995, the Appeals Council denied the request for review and rejected his arguments that his right to due process of law was **violated and held** that his other allegations were unsupported. Plaintiff has fully and completely exhausted his administrative remedies.

Wherefore, plaintiff prays:

1. That this Court require defendant Shirley S. Chater, Commissioner of Social Security, to answer this complaint and file a certified copy of the transcript of record of said hearing, including ail facts and evidence upon which said decision was made.

2. That on the hearing of evidence and study of said transcript, said decision be reviewed, reversed, and set aside.

3. Alternatively, that on the hearing of said evidence and study of

said transcript, said decision be reviewed and set aside, and the case be remanded for further administrative proceedings consistent with the order of this Court on the grounds that plaintiff s right to due process of law has been violated and the procedures described in Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (197 1) for conducting an administrative hearing were not followed by the Commissioner.

4. For costs of suit herein, and such other and further relief as the Court deems proper.

DATED: November 3, 1995 Respectfully Submitted,

By_____
JOHN V. JOHNSON
Attorney for Plaintiff

VERIFICATION

I, the undersigned, say:

I am the plaintiff in the above entitled action. I have had the foregoing COMPLAINT read to me and know the contents thereof, and the same is true of my knowledge, except as to those matters which are therein stated upon my information and belief, and as to those matters I believe it to be true.

I declare under penalty of peijury that the foregoing is true and correct.

Executed on _____, 1995, at San Francisco, California.

By_____
PETER BASSO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER BASSO,	)	Filed Dec 06, 1996
	)	
Plaintiff,	)	No. C-95-3947 EFL
	)	
VS.	)	ORDER
	)	
SHIRLEY S. CHATER, Commissioner of Social Security,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

1. INTRODUCTION

Plaintiff Peter Basso challenges the decision of the Commissioner of the Social Security Administration dismissing his request for a hearing before an Administrative Law Judge ("ALJ"). Defendant moves this Court to dismiss on the grounds that the Court is without jurisdiction to review Basso's claim because he has not exhausted his administrative remedies. Basso filed an opposition to the motion asserting that a colorable constitutional issue provides this Court with jurisdiction. For the reasons set forth below, defendant's motion to dismiss is GRANTED.

II. FACTUAL BACKGROUND

Basso became eligible for disability insurance benefits in February 1978 and for Supplemental Security Income ("SSI") benefits in January 1979. In 1987, the Social Security Administration approved

Basso's Plan to Achieve Self-Support ("PASS"). A PASS allows recipients to exclude from their countable income for SSI purposes those amounts of income needed to fulfill the plan. In the PASS filed in 1987, Basso stated that his occupational objective was to become a lawyer. The Social Security Administration took action to terminate Basso's PASS on the grounds that it exceeded the regulatory time limit of 48 months. Basso subsequently appealed, challenging the validity of the time limit. On November 14, 1994, the Social Security Administration filed a Stipulated Order, stating that Basso's PASS could be extended if he demonstrated that he was otherwise in compliance with PASS regulations and his PASS objectives, needed additional time to complete his PASS, and needed to exclude additional income or resources to complete his PASS.

While **Basso's civil suit was pending,** he filed an application for a new PASS plan. His new PASS stated that his goal was to become a practicing attorney and to establish a law office. The claim was denied initially and on reconsideration because the occupational goal listed was the same as the objective in Basso's **prior PASS. Basso** filed a request for a hearing before an ALJ. A hearing date was set. Basso came to the Office of Hearings and Appeals for the hearing on the scheduled date. He arrived about fifteen minutes early without representation and asked that he be allowed to review his file. Basso alleges that the office of Hearings and Appeals worker and the ALJ's assistant refused to allow him to look at his file. Basso did not attend the hearing. He contends that he refused to go ahead with the hearing because he believed that he was being treated unfairly in that 1) he was not allowed to look at his file and 2) there were two security personnel, who he was informed would be present in the hearing room.

Later that day, Basso faxed a letter to the ALJ. In the letter, Basso stated that he did not intend to abandon his claim, requested that his file be left open, and asserted that he believed the hearing procedures were unfair.On May 11, 1995, the ALJ issued a Notice of Dismissal of the request for a hearing on the grounds that Basso abandoned his request when he failed to attend the scheduled hearing. The Appeals council denied Basso's request for review of the ALJ's dismissal of

his hearing request. Further, the Appeals Council noted that Basso did not have "good cause," as set forth in 20 CFR 416.1457, for his failure to appear at the hearing. Accordingly, the Council held that the ALJ acted properly in dismissing Basso's request for a new hearing.

III. DISCUSSION

The resolution of this case turns on whether this Court has jurisdiction to review Basso's claim. 42 U.S.C. § 405(g) states, in pertinent part: "Any individual, after any final decision of the Commissioner of Social Security made after a hearing . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision . . . . "

The Ninth Circuit has noted that "the Supreme Court has stated that section 405(g) clearly limits judicial review to a particular type of agency action, a final decision of the Secretary made after a hearing." Hoye v. Sullivan, 995 F.2d 990 (9th Cir. 1992) (citing Califano v. Sanders, 430 U.S. 99, 108 (1977) (internal quotations omitted). In Hoye, the Ninth Circuit stated that district courts do not have jurisdiction over decisions of the Social Security Commissioner unless the claimant has exhausted the administrative remedies or the claimant demonstrates that he has a constitutional claim which is 1) collateral to a substantive claim of entitlement, (2) colorable, and (3) "one whose resolution would not serve the purposes of exhaustion." Id.., at 991.

A. Exhaustion of Remedies

The Ninth Circuit has held that refusing to attend a hearing constitutes a failure to exhaust the administrative remedy upon which judicial review depends. Id. Here, Basso refused to attend the scheduled hearing. Therefore, he has failed to exhaust his administrative remedies. Accordingly, this Court does not have jurisdiction to review Basso's claim unless Basso provides this court with an independent ground of jurisdiction.

B. Constitutional Claim

This Court has an independent ground of jurisdiction if Basso has a colorable constitutional claim against defendant. Basso contends that defendant violated his right to due process. To support his claim, Basso initially asserted that the presence of the security personnel at the hearing and the denial of his right to see his files established a constitutional claim. Basso now concedes that the regulations do not preclude the presence of security personnel at the hearing. Basso's only remaining claim is that the denial of his right to see his file violated his procedural due process rights.

In order for Basso to support his claim, Basso must demonstrate that his due process claim is colorable. See Id. In Hoye, the claimant asserted that the ALJ was biased and thus, his right to due process was violated. Id. at 991. The Ninth Circuit stated that "a constitutional claim is not colorable if it clearly appears to be immaterial and is made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous . . . Id at 991-92. The Ninth Circuit stated that the claimant failed to appear at the hearing and thus, chose not to participate in the established process. Accordingly, it held that the claimant failed to demonstrate a procedural due process violation. See Id. At 992.

The Ninth Circuit explained that if an ALJ refuses to recuse himself for bias or prejudice, after having been requested to do so, a claimant may present his objections to the Appeals Council "after the hearing." Id. The Appeals Council then decides whether the hearing decision should stand, be revised, or whether a new hearing should be ordered before another ALJ. Judicial review is also available. However, when claimant and his counsel fail to appear, the ALJ is fully empowered to dismiss the request for a hearing. Id. (citing 20 CFR § 404.957(b)(1)).

This Court finds that even accepting Basso's version of the facts as true, he was not denied due process. Basso could have requested that the ALJ allow him to review his files at the hearing. If the ALJ refused after such a request was made, Basso could have presented

his objections to the Appeals Council after the hearing. Further, Judicial review would have been available. This Court concludes that when Basso failed to appear at the hearing, the ALJ was empowered to dismiss the request for a hearing. See Hoye v. Sullivan, 985 F.2d 990, 992 (9th Cir. 1992) (citing

20 CFR 9 404.957(b)(1)).

IV. CONCLUSION

The court concludes that it lacks subject matter jurisdiction because plaintiff has failed to exhaust his administrative remedies as required by 42 U.S.C. § 405(g) and has failed to establish a colorable constitutional claim. Accordingly, defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

DATED: 1996.

EUGENE F. LYNCH
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER BASSO,	)	Filed Dec. 06, 1996
	)	
Plaintiff,	)	No. C-95-3947 EFL
	)	
VS.	)	JUDGMENT
	)	
SHIRLEY S. CHATER, COMMISSIONER of Social Security,	)	
	)	
	)	
Defendant.	)	
	)	

Pursuant to the Order of today's date granting defendant's motion to dismiss, the Court hereby enters judgment in favor of the defendant in this action.

IT IS SO ORDERED.

DATED: 1996.

EUGENE F. LYNCH
United States District Judge

JOHN V. JOHNSON
341 Flume Street, Suite C
Chico California 95928
Telephone: (916) 893-0696
State Bar #103137

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETER BASSO,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL NO. 95-3947 EFL
	)	
SHIRLEY S. CHATER,	)	PLAINTIFF'S NOTICE
	)	OF APPEAL
Commissioner of	)	
Social Security,	)	
	)	
Defendant.	)	
	)	

TO THE DEFENDANT:
PLEASE TAKE NOTICE that plaintiff is appealing the United States District Court's decision, affirming the decision of the Commissioner of Social Security that dismissed his request for hearing in regards to his claim for a Plan to Achieve Self-Support (PASS) and Supplemental Security Income, to the United States Court of Appeals for the Ninth Circuit.

DATED: January 14,1997 Respectfully Submitted,

By_____
JOHN V. JOHNSON
Attorney for Plaintiff

PROOF OF SERVICE BY MAIL

NAME OF COURT: IN THE UNITED STATES SUPREME COURT

TITLE OF CASE: PETER BASSO v. KENNETH S. APFEL, Commissioner of Social Security

CASE NO.: 95-3947 EFL

I am a citizen of the United States and employed in the City of Chico, Butte County, California. I am over the age of 18 and not a party to the within entitled action. My business address is 341 Flume Street, Suite C, Chico, California 95928.

On August 3, 1998, I served the following:

PETITION FOR WRIT OF CERTIORARI

on the parties in said action, by depositing a true and correct copy (copies) thereof in the United States mail in Chico, California, in a sealed envelope with postage prepaid, and addressed to:

Solicitor General of the United States
Department of Justice, Room 5614
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
(202) 514-2218

Office of the General Counsel
Social Security Administration
6401 Security Boulevard, Altmeyer Building
Baltimore, Maryland 21235
(410) 965-3164

United States Attorney
Department of Justice
450 Golden Gate Avenue
San Francisco, California 94102
(415) 436-7260

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 3, 1998, at Chico, California.

John V. Johnson (State Bar #103137)
NAME

_____
SIGNATURE

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to: 555-72-2045

Office of Hearings and Appeals
525 Market Street, Suite 550
San Francisco, Ca 94105-2776
Telephone: (415) 3080

NOTICE OF DISMISSAL

PETER BASSO
P.O. BOX 14066
SAN FRANCISCO, CA 94114

I have issued the enclosed order dismissing your request for hearing. Please read this notice and the order carefully.

If You Disagree With The Order of Dismissal

If you do not agree with my order, you may file an appeal requesting the Appeals Council to review and vacate the order.

How To File An Appeal

To file an appeal you or, if you appoint one, your representative must request the Appeals Council to review the order of dismissal. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social security office or a hearing office. You may also mail your request right to the Appeals Council, office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within 60 days from the date you get this notice.

The Appeals council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The council will dismiss a late request unless you show you had a good reason for not filing it on time.

Do You Want To Submit Evidence?

You may submit evidence to show why you think I should not have dismissed your request for hearing. You should submit any evidence you wish the Appeals Council to consider with your request for review.

Rules About An Appeal

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 201 Chapter III, Part 416, Subpart N. The Council will review an order of dismissal for the reasons listed in section 416.1470 of the regulations.

If You Do Not File an Appeal With The Appeals Council

If you do not appeal my order and the Appeals Council does not review the order on its own motion, the action or determination upon which you requested a hearing cannot be changed except under special rules.

Your Right To Representation

You may have a lawyer or other person help you in any request for review you file with the Appeals Council. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your case. Your local Social Security office has a list of groups that can help

you with a request for review.

If you get someone to help you, you or that person should let the Appeals Council know. If you hire someone, we must approve the fee before he or she can collect it.

Do You Have Any Questions?

If you have any questions, you may call, write or visit any Social Security office. If you visit an officer please bring this notice and decision with you. The telephone number of the local office that serves your area is (415) 556-5624. Its address is 4377 MISSION STREET SAN FRANCISCO, CA. 94112.

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

ORDER OF DISMISSAL

IN THE CASE OF

PETER BASSO
(Claimant)
555-72-2045

Supplemental Security Income

(Wage Earner)

(Social Security Number)

This case is before the Administrative Law Judge on the request for hearing filed by the claimant on December 12, 1994.

On April 11, 1995, a Notice of Hearing was mailed to the claimant to advise him of the for the hearing set for 1:00pm on May 11, 1995.

Social Security Administration Regulations No. 16 provides that the Administrative Law Judge may dismiss a request for hearing when the claimant does not appear at the time and place set for the hearing. The Notice of Hearing sent to the claimant contained this information.

The claimant abandoned his request for hearing by refusing to go into the scheduled hearing because there was a security guard in the hearing room. Therefore, the request for hearing is hereby dismissed and the reconsideration determination remains in effect.

F. NEIL ASCHEMEYER
Administrative Law Judge

Date

LIST OF EXHIBITS

PETER BASSO (Claimant) _____ (Social Security Number)

_____ (Wage Earner)

Exhibit No.	Description	No. of Pages
1.	Disability determination by State Agency, January 3, 1979 (allowance)	2
2.	Request-for reconsideration, December 17, 1993	2
3.	Notice of reconsideration, December 18, 1993/Informal conference scheduled	2
4.	Notice of reconsideration, January 14, 1994	2
5.	Notice of Decision-- Fully Favorable, February 3, 1994 & Decision	7
6.	Request to claimant, February 7, 1994 re: additional information	4
7.	Request for reconsideration, March 1, 1994	2
8.	Appeals Council Notice, March 11, 1994 re: Reversal of ALJ Decision of February 3, 1994 w/attached. memos of February 17, 1994 & February 22, 1994	6
9.	Response to claimant, March 4, 1994 re: request for reconsideration filed March 1, 1994	1
10.	Notice to claimant re: review of file scheduled, April 7, 1994	1
11.	Appeals Council cover letter to claimant w/attached Decision of the Appeals Council, May 27, 1994 upholding reversal of ALJ Favorable Decision & ceasing claimant's benefits as of December 1, 1991	5
12.	Important Information notice to claimant, October 27, 1994 re: PASS PLAN not approved	3
13.	Request for reconsideration, November 7, 1994	2
14.	Notice of reconsideration, November 8, 1994 w/attached District Officerecord of SSI Reconsideration,	

November 8, 1994 4

15. Request for hearing, December 12, 1994 2
16. Statements of claimant, May 22, 1990 w/attachments 7
17. Report of contact, December 20, 1993 re: personal conference & visit toDistrict Office of December 20, 1993
18. Documents submitted from claimant re: Law School & Degree 31
19. Statement for-Determining continuing eligibility for Supplemental Security Income 6
20. continuation & further attached documents/records dated January 12, 1994 6
21. Report of contact, January 13, 1994 re: contact w/claimant 7
22. Dept. of Rehabilitation SSA/VR Information Exchange - Plans for Achieving Self Support, January 25, 1994 w/attached page of calculations 3
23. Record of conversation, February 2, 1994 re: verification of Law School Attendance/Completion
24. Record of Conversation, February 16, 1994 re: Empire College School of Law
25. Letter of claimant, March 1, 1994 2
26. Letter from San Francisco State University, April 15, 1994 re: claimant's participation 1
27. Report of contact, April 20, 1994 re: copying of file/copies provided to claimant w/attached copy of report of contact, November 8, 1988 re:claimant reporting work activity 2
28. Record of conversation, June 13, 1994 re: PASS PLAN & Appeals Council Decision 1
29. Record of Conversation, June 14, 1994 re: PASS PLAN approval1
30. Report ol contact, October 27, 1994 re: PASS PLAN denial 1
31. Report of contact, November 3, 1994 re: Law Degree 1
32. Letter of claimant, November 26, 1994 re: denial of PASS PLAN 4
33. Decision by U.S. District Court/Judgment dated July 30, 1987 12

Exhibits presented during oral hearing -- dated May 11, 1995

34.	Motion For Subpoenas sent by Mr. Basso dated April 27, 1995	2
35.	letter from claimant dated May 9, 1995	1
36.	Duplicate of Exhibit 35	1
37.	Decision by U.S. District Court dated November 29, 1994	15
38.	Decision by U.S. District Court dated November 29, 1994	4
39.	Decision by U.S. District Court dated January 1995	8
40.	Plans for Achieving Self -Support-Information	2
41.	Program Operations Manual System Material	16
42.	Plans for Achieving Self-support For blind or disabled people-POMS References	4
43.	Federal Supplement	13
44.	Pages from Congressional And Administrative News	4
45.	Deering California Codes	8
46.	U.S. Code Congressional and Administrative News	16
47.	Congress of the United States letter from Pete Stark	1
48.	Letter from John R. Ridriguez to Mark Owens regarding Peter Basso dated March 28, 1990	1

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to:
33GCS
555-72-2045

Office of Hearings and Appeal

ACTION OF THE APPEALS COUNCIL

Mr. Peter Basso
P.O. Box 14066
San Francisco, CA 94114

Dear Mr. Basso:

The Appeals Council has considered the request for review of the Administrative Law Judge's dismissal issued on May 11, 1995.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion bv the Adminlistrarive Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's action, findings, or conclusion is contrary to, the weight of the evidence currantly of record (20 CFR 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review.

In your letter of August 16, 1995 you do not specifically state why the Administrative Law Judge acted improperly in dismissing your

request for hearing. You have alleged that the dismissal denied you of due process; that you were treated in a humiliating and discriminatory manner; and that you had not abandoned your case but simply would not attend a hearing unless it was conducted based on terms you found satisfactory. You further contend that you were denied access to your files and that the Administrative Law judge acted improperly in denying your request for a subpoena.

Regarding your latter assertion, the Appeals Council refers you to 20 CFR416.1450(d)(2) which states the information which must be included in the subpoena request. The record shows that the Administrative Law Judge properly denied your request because it did not provide the information required. The Council also notes that this regulation does not require the Administrative Law Judge issue subpoenas whenever requested but states that the Administrative Law Judge may do so when it is reasonably necessary for the full presentation of a case.

Although you have alleged that you were denied access to your claims file, there is no evidence supporting your allegation. The Notice of Hearing informed you to arrive 30 minutes prior to the hearing to review your file. There is no indication that you objected to this arrangement.

You further allege that you were treated in a humiliating and discriminatory manner but you do not specify exactly what occurred. The Administrative Law Judge's Order of Dismissal indicates that you refused to enter the hearing roon due to the presence of a security guard in the room. If this is the basis for your allegations of discrimination, the Appeals Council concludes that they are without merit. The regulations do not preclude the presence of security personnel in hearing rooms nor does their presence lead to a conclusion that the hearing will be unfair or biased in any way.

The Appeals Council has concluded that the Administrative Law Judge acted properly in dismissing your request for hearing as your refusal to enter the hearing room, except on your own terms, may be

construed as failure, without good cause, to appear at the place set for the hearing (20 CFR 416.1457).

The Council has also considered whether the additional material submitted by you and your representative provides a basis to reopen and revise the reconsideration determination of November 7, 1994 which denied your current PASS plan on the basis that only one PASS plan may be approved per occupational objective and that the current PASS plan had the same occupational objective as your previous PASS plan.

In accordance with 20 CFR 416.1487 a determination may be reopened within 2 years of the initial determination on the basis of new and material evidence or if the evidence considered in making the determination clearly shows on its face that an error was made (20 CFR 416.1487 through 416.1489). The initial determnation in your case was issued October 27, 1994. The argument and material you submitted is not relevant to the issue of whether the occupational objective of your current PASS is different from that of your previous PASS. Some of your argument is addressed to the issue of whether your occupational objective should be "deemed" to be feasible. However, the feasibility of your occupational objective was not the basis for the denial. You have also argued that your current PASS was not processed within 60 days. You have contended that the Congress intended this "deemed" approval and you submitted a copy of "Congressional and Administrative News" as evidence of your contention. This simply states, however, that such a provision was part of a House bill. The Senate did not agree with this provision and in conference committee it was deleted. Your contention is, therefore, not supported by the evidence you submitted.

As the additional items and argument you have submitted to not materially alter the prior determnation and the Council sees no error on the face of the evidence considered at the time of that determination, reopening of that determination is not warranted, your implied request for reopening is denied, and the reconsideration determnation of November 7, 1994 stands as the final determination

of the Commissioner with respect to the PASS plan you submitted on February 7, 1994.

Sincerely Yours,

Larry K. Banks
Administrative Appeals Judge

cc:

John V. Johnson, Esq.
HO, San Francisco, Ca (ALJ Aschemeyer)

DECLARATION OF PETER J. BASSO

I, Peter J. Basso, declare:

1.I am over the age of eighteen and a party to this action. I have personal knowledge of the matters set forth herein and if called to testify could and would testify hereto.

2. On May 11, 1996, 1 was scheduled for a hearing before Administrative Law Judge F. Neil Ascherneyer of the Social Security office of Hearings and Appeals, at 1:00 p.m.

3. At approximately 12:45 p.m., I arrived fifteen (15) minutes early for my hearing without representation, but with Rita Tonucci, my witness, in order to look at my files prior to the hearing set for 1:00 p.m. that day. I was informed by a hearing and appeals employee at the front window that he had been instructed not to allow me to see my files. I questioned him as to whom instructed him as to my not being able to see my files and he responded with stating that he was not allowed to provide that information.

4. I then sat down with Rita Tonucci, my witness, and waited to be called for my hearing appointment.

5. At approximately 1:00 p.m., Ms. Shanks, Judge Aschemeyer's hearing assistant
walked out of a hearing room door and instructed me that it was time to conduct the hearing. At that time I again asked if I could please look at my files because there was some important evidence in the files that I needed because I did not have copies of that particular document.
Ms. Shanks informed me that their office had been informed by the Commissioner's office not to let me see my files. When I asked Ms. Shanks if I could please ask Judge Aschemeyer if I could please see my file and the reason why, I was informed by Ms. Shanks that Judge Ascherneyer did not speak with the public.

6. At the same time as Ms. Shanks appeared, she

appeared with two plainclothes
federal officers. Ms. Shanks informed me that I would have to sit between them during my hearing, When I asked why, I was informed that this is what the Commissioner's office had ordered. I refused, because I felt that I was being treated as a criminal for no reason.

7. At that point Rita Tonucci, my witness, stated to me, "letsjust go", so I informed
Ms. Shanks that I would not go into the hearing room under such cruel and unusual treatment and that I would be leaving the hearing office to go home.

8. Once home, I faxed a letter to Judge Aschmeyer stating why I left the hearing office and that I had not abandoned my case. (See faxed letter dated May 11, 1996, attached hereto).

I declare under penalty of perjury that the foregoing is true and correct. Executed on 1996, at Sebastopol, California.

By
Peter J. Basso
Declarant

May 11, 1995

F. Neil Aschemeyer
Hearings And Appeals Office
525 Market Street, 35th Floor
San Francisco, California 94105

Re: May 11, 1995 hearing at 1:00p.m.

Mr. Aschemeyer:

Today I had a hearing scheduled for 1:00p.m. However, upon my arrival, with a attorney friend of mine, you and your staff discriminated against me in the most blatant manner.

For two weeks now I have been asking Ms. Shanks, your hearing assistant for a time that I could look at my files, as is my right as stated in the CFR. However, she informed me that I was not allowed to do so. When I asked her who made that decision she refused to tell me. Today you and your staff did not want me to look at my files and said so in front of my witness.

You should know that I am not abandoning my claim. I plan to appeal anything you do. I motioned for a subpoena of witnesses and you refused to subpoena them.

The last decision you made regarding this issue is now at the Federal Court level in a certified class action. This was after the Appeals Council overturned your decision because you misused the law.

Please keep my case open until it can be dealt with in a professional manner by you and your staff, especially Ms. Shanks, your administrative hearing assistant.

Anyway, I have not abandoned my case, you have, and when you

feel that you are capable of handling this in a professional manner please contact me. until then please keep my case open", because I plan to re subpoena witnesses and I have additional evidence to introduce.

Thank You,

P. Basso

Citation/Title
SSR 79-19, Program Policy Statement TITLES II, XVI AND XVIII: WAIVER OF PERSONAL
APPEARANCE AT A HEARING

*2026 1975-1982 Soc.Sec.Rep.Serv. 391
Program Policy Statement

TITLES II, XVI AND XVIII: WAIVER OF PERSONAL APPEARANCE AT A
HEARING

SSR 79-19

For Publication as PPD-33
1979

PURPOSE: To establish requirements necessary for a valid waiver of an individual's right to appear, in person or through a representative, and present evidence or information at a hearing before the Office of Hearings and Appeals; or before a presiding officer of a Medicare carrier in the case of hearings under the Supplementary Medical Insurance Program. The intent of this policy modification is to ensure that such waivers are made voluntarily and knowingly; i.e., with knowledge of the advantage of personal appearance and the consequences of a waiver of the right to appear at the hearing.

CITATIONS (AUTHORITY): Sections 205(b), 1631(c)(1), 1842(b)(3)(C), and 1869(b), and 1876(f) of the Social Security Act, and Section 413(b) of the Federal Coal Mine Health and Safety Act; Regulations No. 4, Subpart J, Section 404.934, Regulations No. 5, Subpart G, Section 405.701, Subpart H, Section 405.831 and Subpart T, Section 405.2060, Regulations No. 10, Subpart F, Section 410.647(a), Regulations No. 16, Subpart N, Section 416.1446(b).

PERTINENT HISTORY: The acts cited above provide each claimant shall have an "opportunity for a hearing." Social Security regulations further provide that any party to a hearing has a right to appear,

personally or by representative, and to present evidence or information directly regarding the hearing issue. The regulations also provide that these rights may be waived. The only current requirement for a valid waiver is that it be filed in writing. For administrative convenience, Form HA-501, "Request for Hearing," has a checkblock for this purpose worded as follows: "I waive my right to appear and give evidence, and hereby request a decision on the evidence on file."

Even when such waiver of appearance is filed, current regulations provide the waiver may be withdrawn by a party prior to the mailing of notice of the decision rendered in the case.

Moreover, the regulations provide that the presiding officer may notify the individual or the individual's representative that a hearing will be conducted and then hold the hearing if the officer believes that the personal appearance and testimony would help in deciding the issue in question. However, at recent meetings with representatives of legal-aid groups a recommendation has been made that the Social Security Administration (SSA) should take additional steps to insure that an individual's waiver of the right to appear at a hearing is made entirely voluntarily and is based on a full understanding of the results of such a decision. Adequate protection of this right is important because, by waiving attendance at a hearing, the appellant gives up an opportunity to present additional oral testimony himself or herself, or through a representative, directly to the decision-maker, even though this could affect the decision.

*2027 Review of recent SSA experience indicates that some appellants, particularly disadvantaged appellants, may indeed have jeopardized their benefit rights by waiving personal appearance at hearings; in fact, in several pending SSA litigation cases, contentions have been made that personal appearances at a hearing were waived without full knowledge of the consequences. Particularly in borderline cases, experience shows that a disability issue may best be resolved on the basis of detailed testimony as to the individual's activities, background, experience, etc., presented at the hearing. The

presiding officer's personal observations of the appellant can also add additional weight to the medical evidence or other information of record. In view of the importance of the hearing appearance rights of appellants, modification of current policies is warranted.

POLICY DIRECTIVE STATEMENT: An individual who files a request for hearing must be given a thorough explanation of the hearing procedure. The individual should fully understand his or her rights to appear personally before the presiding officer and present evidence, to introduce witnesses and oral or written arguments, and to be represented by an attorney or other person of his or her choice. The individual must also be advised of the value of personal appearance at a hearing. It should be made clear that, in some cases, additional evidence obtained at the hearing, particularly through personal appearance and/ or oral testimony, may be essential to the proper evaluation of the factors at issue.

If, after such explanation, the individual or the individual's authorized representative wishes to waive the right to personal appearance, he/she must sign a statement to that effect in accordance with the evidence requirements described below. If such a statement has not been obtained although required, the presiding officer will request it. Notwithstanding the fact that a waiver of personal appearance meeting these requirements has been filed, the presiding officer may schedule and conduct a hearing in accordance with existing regulations when deemed necessary to making a proper decision on the issue in question. The right to withdraw a waiver of personal appearance before a notice of hearing decision is mailed remains unchanged. Also unchanged are the current regulatory provisions which apply to appeals filed by Medicare providers and suppliers.

DOCUMENTATION: An individual or the individual's authorized representative may waive the right to personal appearance at a hearing only by a writing signed by the individual or the authorized representative which shows:

1. a thorough explanation of the hearing procedure has been given;

2. the right to personal appearance at the hearing to testify and present evidence has been explained;

3. an explanation has been given of the right to representation at the hearing by an attorney or other person of the individual's choice;

4. it has been explained that, in some cases, additional evidence obtained through oral testimony and personal presence before the presiding officer may be of value in evaluating the issues;

5. the individual has been advised that, if he or she does not appear, the
claim will be decided solely on the written evidence then in file plus any
additional evidence submitted by the individual or the representative or obtained
bv the hearing officer.

*2028 6. the individual has been advised that he or she may withdraw the waiver of the right to appear at the hearing at any time prior to mailing of the notice of the decision.

CROSS-REFERENCES: Claims Manual sections 7109.4; 7192, Exhibit 2; 13612 and 13685.

Social Security Administration

Department of Health and Human Services

Hearing Before an Administrative Law Judge

1416.1429 Hearing before an administrative law judge-general

If you are dissatisfied with one of the determinations or decisions listed in 1416.1430 you may request a hearing. The Associate Commissioner for Hearings and Appeals or his or her delegate, shall appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Associate Commissioner, or his or her delegate. may assign your case to another administrative law judge. At the hearing you may appear in person, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she shall issue a decision based on the hearing record. If you waive your right to appear at a hearing, the
administrative law judge will make a decision based on the evidence that is in the file and any new evidence that may have been submitted for consideration.

[45 FR 52096. Aug. 5. 1980. as amended at 51 FR 307 Jan. 3, 1986]

§ 416.1457 Dismissal of a request for a hearing before an administrative law judge.

An administrative law Judge may dismiss a request for a hearing under any of the following conditions:

(a) At any time before notice of the hearing decision is mailed, you or the party or parties that requested the hearing ask to withdraw the request. This request may be submitted in writing to the administrative law judge or made orally at the hearing.

(b)(1) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and you have been notifled before the time set for the hearing that your request for a hearing may be dismissed without further notice if you did not appear at the time and place of hearing and good cause has not been found by the administrative law judge for your failure to appear; or

(2) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and within 10 days after the administrative law Judge mails you a notice asking why you did not appear, you do not give a good reason for the failure to appear.

(c) The administrative law judge decides that there is cause to dismiss a hearing request entirely or to refuse to consider any one or more of the issues because-

(1) The doctrine of 'res judicata' applies in that we have made a previous determination or decision under this subpart about your rights on the same facts and on the same issue or issues, and this previous determination or decision has become final by either administrative or judicial action;

(2) The person requesting a hearing has no right to it under 416.1433(c);

(3) You did not request a hearing within the stated time period and we have not extended the time for requesting a hearing under § 416.1433(c); or

(4) You die, there are no other parties, and we have no information to show that you may have an eligible spouse. However, dismissal of the hearing request will be vacated if, within 60 days after the date of the dismissal, another person claiming to be your eligible spouse submits a
written request for a hearing on the claim and shows that he or she may be adversely affected by the determination that was to be reviewed at the hearing.

[45 FR 52096. Aug. 5. 1980, as amended at 50 FR 21439, May 24. 1985: 51 FR 308. Jan. 3.
1986]

NOT FOR PUBLICATION

FILED
Feb 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER BASSO,	)	
	)	
Plaintiff-Appellant,	)	No. 97-15105
	)	
V.	)	D.C. No. CV-95-03947-EFL
	)	
SHIRLEY S. CHATER, Commissioner of Social Security,	)	MEMORANDUM*
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Submitted February 13, 1998
San Francisco, California

Before: HUG, Chief Judge, FERNANDEZ and THOMAS, Circuit Judges.

Peter Basso appeals the district court's dismissal of his appeal from the Social Security Administration for lack of jurisdiction. We review a dismissal for lack of subject matter jurisdiction de novo. Evans v. Chater, 110 F.3d 1480, 1481 (9th Cir. 1997).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The district court correctly concluded that it lacked subject matter jurisdiction. Basso failed to exhaust his administrative remedies pursuant to 42 U.S.C. 405(g). He also failed to allege a "colorable" constitutional claim, and thus does not come within the exception to § 405(g). See Hoye v. Sullivan, 985 F.2d 990, 991 (9th Cir. 1992). Thus, we affirm the district court's dismissal of this case for lack of subject matter jurisdiction.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-15105
CT/AG#: CV-95-03947-EFL

PETER BASSO

Plaintiff - Appellant

V.

SHIRLEY S. CHATER, Commissioner of Social Security

Defendant - Appellee

APPEAL FROM the United States District Court for the Northern District of California (San Francisco) .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered February 18, 1998